IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN T. LEONETTI and SUSAN J. LEONETTI, husband and wife, Plaintiffs/Appellants, v. PIMA COUNTY, a political subdivision of the State of Arizona; PIMA COUNTY BOARD OF ADJUSTMENT DISTRICT NO. 3, acting through its members, JOE MURRAY, MARSHA MENDELSOHN, J. ERIC GREESON, and KEVIN McHUGH, Defendants/Appellees.	2 CA-CV 2006-0168 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20045678

Honorable John E. Davis, Judge

AFFIRMED

John T. Leonetti
Susan J. Leonetti
Sahuarita
In Propria Personae

Barbara LaWall, Pima County Attorney
By Jacob Lines
Tucson
Attorneys for Defendants/Appellees

P E L A N D E R, Chief Judge.

¶1 In this zoning action, appellants John and Susan Leonetti appeal from the trial court's grant of summary judgment in favor of appellee Pima County. The Leonettis contend, inter alia, the trial court erred by "ignor[ing] [their] primary legal argument" and denying them "their due process rights." Finding no error, we affirm.

BACKGROUND

¶2 "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). The Leonettis own a twenty-acre parcel of property in Sahuarita, Arizona. The property is zoned with the County's "Rural Homestead" (RH) designation. In March 2004, the County zoning enforcement office received a complaint about the property, and the County's chief zoning inspector investigated the complaint. She found more than thirty vehicles on the property. The inspector averred the Leonettis had told her the vehicles were "a personal collection" and "all had current registration and were insured."

¶3 The inspector "determined that the parking of large numbers of vehicles on residential property [wa]s not an allowable use in the RH zone." But she also averred she had informed the Leonettis that, because their use of the property was "similar in type, scale and intensity to a contractor's yard, which is allowed in the RH zone with a conditional use permit," they could apply for such a permit and it would allow them to "use a portion of the [p]roperty for an auto storage lot." The Leonettis apparently never completed this process.

¶4 Thereafter, the Leonettis appealed to the Pima County Board of Adjustment (BOA), challenging the inspector's interpretation of the Pima County Zoning Code as excluding their use of the property. After a hearing, the BOA upheld the inspector's interpretation of the zoning code. The Leonettis then filed this action in superior court, seeking a "Statutory *de novo* Appeal" under A.R.S. § 11-807(D) and declaratory judgment under A.R.S. § 12-1831. The County moved for summary judgment, which the trial court granted, stating it was "persuaded by the fact that Arizona and other jurisdictions have upheld similar provisions . . . regarding excessive accessory use of residential property" and have found "the prohibition of storing numerous vehicles . . . constitutional and not void for vagueness." The court also found that "no issues of fact remain[ed]" and rejected the Leonettis' argument that "they were prevented from giving their presentation" to the BOA because the County's affidavit refuted that claim and the Leonettis had not presented evidence to support the allegation.

¶5 The Leonettis then filed a "response" to the trial court's ruling, which included a transcript of the BOA hearing. The trial court noted that the unsigned "response" did not comply with Rule 11, Ariz. R. Civ. P., 16 A.R.S., Pt. 1, and the new evidence the Leonettis sought to introduce did not "comply with the requirements of Rule 56," 16 A.R.S., Pt. 2. The court therefore denied the Leonettis' request to supplement the record and, treating their "response" as a motion for reconsideration, denied it as well. The court ordered the County to submit a form of judgment, which was lodged on May 9, 2006.

¶6 The Leonettis again moved for reconsideration on May 17, this time providing an unsworn document they entitled an "affidavit." The trial court denied that motion, stating that the time to object to the form of the judgment had expired, that the "affidavit was not timely filed," and that the motion for reconsideration was "inadequate." The trial court then entered a judgment on June 1, and this appeal followed.[1]

DISCUSSION

¶7 "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell*, 192 Ariz. 313, ¶ 8, 965 P.2d at 50. The Leonettis first argue the trial court "ignored" their "primary legal argument"—that the inspector and the BOA had wrongly interpreted the zoning code and that issues of fact precluded summary judgment.[2] The record, however, does not support the assertion that the trial court "ignored" the Leonettis' legal arguments. Rather, the record shows the court addressed the issues they had raised. As noted above, in its summary judgment ruling and subsequent judgment, the trial court stated it was "persuaded that Arizona and other jurisdictions have upheld similar provisions and interpretations of zoning codes" to that of the inspector and the BOA and concluded that "the prohibition of storing numerous vehicles [was] constitutional and not void for

[1]In its order of December 5, 2006, on reconsideration, this court previously addressed and denied the County's motion to dismiss this appeal based on an untimely filed notice of appeal.

[2]The Leonettis also argue the trial court "erred [in] stating that [they] did not demand a jury trial." But, because we affirm the trial court's grant of summary judgment, we need not address this issue.

vagueness." In view of the court's clear rulings on the legal issues raised below, we find no merit in the Leonettis' contention that the trial court "ignored" their arguments.

¶8 The Leonettis also maintain the trial court ignored "genuine issues of fact." But they then make legal arguments based on their interpretation of the zoning code and do not cite any factual disputes in the record. Indeed, the only *factual* dispute the Leonettis cite relates to the hearing before the BOA. The Leonettis claim "they were prevented from presenting their information to the BOA." But no transcript of the BOA hearing was ever properly brought before the trial court.[3]

¶9 Even if the Leonettis had properly proffered the transcript, however, they have not shown that it would have raised a *material* issue of fact in the context of a trial de novo under A.R.S. § 11-807(D). Under the statute, the trial court was bound to consider the propriety and constitutionality of the inspector's interpretation of the zoning code de novo, and the BOA's actions in considering those matters, therefore, was not an "essential element[] of the [Leonettis'] cause." *Johnson v. Soulis*, 542 P.2d 867, 872 (Wyo. 1975) ("[F]or purposes of ruling upon a motion for summary judgment a fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties."); *see also Northen v. Elledge*, 72 Ariz. 166, 170, 232 P.2d 111, 113-14 (1951) ("[A]n issue is material if the facts alleged are such

[3]The Leonettis contend, however, that the trial court violated their due process rights by denying their motion for reconsideration, which included what they purported to be a "Partial Transcription of [the] BOA Hearing." But, as discussed in full below, *infra* ¶¶ 24-26, we find no such violation.

as to constitute a legal defense, or, are of such nature as to affect the result of the action.") (citation omitted).

¶10 We also note that in their "response" to the County's motion for summary judgment, the Leonettis failed to comply with Rule 56(e), Ariz. R. Civ. P., which requires a party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial," "by affidavits or as otherwise provided in th[at] rule." In fact, the Leonettis' "response" was unsworn and presented no evidence that would be admissible in evidence, as required by Rule 56. As the County points out, quoting Rule 56(e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading."

¶11 "A failure to respond to [a summary judgment] motion with a written memorandum or opposing affidavits cannot, by itself, entitle the movant to a summary judgment." *Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970); *see also Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15, 83 P.3d 56, 59 (App. 2004). But the record does not suggest the trial court granted summary judgment solely on that basis. And, like the trial court, we consider the merits of the Leonettis' arguments despite their failure below to properly comply with the requirements of Rule 56.[4]

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[4]"[W]here a party conducts his case in propria persona he is entitled to no more consideration than if he had been represented by counsel, and he is held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441, 679 P.2d 84, 87 (App. 1983). We note that the Leonettis argue in their reply brief that *Copper State* is inapplicable to them because Saggio was a defendant and had "never employed an attorney," while they were "forc[ed] . . . into pro se status" because their

¶12 The Leonettis essentially alleged two claims in their complaint: (1) the BOA improperly interpreted the zoning code, and (2) the BOA's interpretation of the code is unconstitutional. We consider each in turn and review these legal issues de novo. *See Whiteco Outdoor Adver. v. City of Tucson*, 193 Ariz. 314, ¶ 7, 972 P.2d 647, 649-50 (App. 1998). After the inspector visited the Leonettis' property, a second inspector wrote them a letter, relying on several different sections of the zoning code and stating that "park[ing] thirty-six vehicles [on an RH property] is not customary and incidental to the use of a single residence property . . . and constitutes an auto storage lot." In their "Application for Interpretation" to the BOA, the Leonettis requested the BOA to interpret several of those sections. The BOA upheld the inspector's interpretation of the zoning code and, consequently, her determination that the Leonettis could not store thirty-six vehicles on their RH-zoned property.

¶13 With respect to the BOA's interpretation of the zoning code, the parties primarily dispute the meaning and application of two code sections—Pima County Code (P.C.C.) §§ 18.01.030(B)(8) and 18.07.030(C). We first address § 18.01.030(B)(8), which

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attorney withdrew from the case. The Leonettis cite no law to support this proposition. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. And, in fact, this rule has been applied where a party appeared pro se as a result of an attorney's withdrawal. *See Kelly v. NationsBanc Mortgage Corp.*, 199 Ariz. 284, ¶ 16, 17 P.3d 790, 793 (App. 2000). The Leonettis argue, however, that *Kelly* supports their position because, in that case, "the Court . . . gave the legally incompetent Kellys more consideration" by granting them "two additional time periods to respond to a motion to dismiss/motion for summary judg[]ment filed against them." Although the *Kelly* court did note that the trial court, in its discretion, granted the Kellys "two additional opportunities to respond to the motion for summary judgment," it did not state the trial court did so solely because the Kellys appeared in propria persona, nor did it require that any other trial court exercise its discretion in the same fashion. *Id.*

provides in pertinent part: "The express enumeration and authorization herein of a particular . . . use in a zone shall be deemed a prohibition of such . . . use in all other zones of more restrictive classification." The RH zone is among the most restrictive zones under the code; only three other zones are more restrictive. P.C.C. § 18.05.010(B)(3). The permitted and conditional uses under the RH zone are set forth in P.C.C. §§ 18.13.020 and 18.13.030. Permitted uses include, inter alia, single detached dwellings, manufactured homes, accessory structures, the raising and grazing of livestock, private stables, and public schools. P.C.C. § 18.13.020. And certain commercial uses, such as restaurants, gasoline service stations, automobile repair or parts stores, or contractors' yards are conditionally permitted uses in the zone. P.C.C. § 18.13.030(B). The list of permitted and conditional uses in the zone does not specifically include the use at issue here—storage of large numbers of vehicles.

¶14 In contrast, P.C.C. § 18.45.030(G) provides that a property in the "General Business Zone" may be used for "[s]torage of operable automobiles, boats, motorcycles, recreational vehicles, and trucks and inhabitable manufactured or mobile homes, not intended for salvage," "if conducted wholly within a completely enclosed building or within an area enclosed on all sides with a solid wall, compact evergreen hedge or uniformly painted board fence, not less than six feet in height." The General Business Zone, CB-2, is less restrictive than the RH zone. P.C.C. § 18.05.010(B). We agree with the County that the Leonettis' use of their property to store more than thirty vehicles "fits within the use enumerated in [§] 13.45.030(G)"—"[s]torage of operable automobiles." Thus, under P.C.C. § 18.01.030(B)(8), because the use in question here is "express[ly] enumerat[ed]" in the less

restrictive CB-2 zone, it is "prohibit[ed] in all other zones of more restrictive classification," including the RH zone.

¶15 The Leonettis argue, however, that "open storage of vehicles is permitted in RH [zone] in § 18.13.045." That section, however, addresses development standards for manufactured home parks and allows a "storage area" that may be used to store "a travel trailer, boat, automobile, recreational vehicle, noncommercial truck, motorcycle, or similar vehicle owned by residents of the park." P.C.C. § 18.13.045(I). But the Leonettis' property is not a manufactured home park, and that code section permits storage of "a travel trailer, boat, automobile, . . . or similar vehicle." It neither addresses nor permits storage of large numbers of vehicles belonging to a single owner.

¶16 The Leonettis also contend that, "[t]o properly interpret the [zoning code], the [inspector] must understand and apply the General Provisions of the [code]." They cite P.C.C. § 18.01.030(B)(1), which provides:

> All property, except that covered by statutory exemptions, shall be hereby governed according to the type of zone in which the same is located, as shown on the zoning maps adopted and made part hereof, and shall be subject to the regulations hereinafter set forth for such zones, the regulations applying to specific uses and the general regulations hereinafter set forth . . . .

Thus, they maintain, "each zone is governed by the [section of the code] set forth for each specific type of zone." In other words, they contend, a "residential zone is governed solely by residential code . . . [and] commercial zones are governed by commercial code. Residential zones cannot be governed by commercial code." According to the Leonettis,

therefore, § 18.01.030(B)(8) should be read to mean that the express enumeration of a "use in a residential zone shall be deemed a prohibition of such use in all other residential zones of more restrictive classification."

¶17 But P.C.C. § 18.01.030(B)(1) merely provides that property must be governed according to the zone with which it is designated and is subject to the regulations of that zone; the code section is silent as to the interplay between residential and commercial zones. And, if the drafters of the zoning code had meant subsection(B)(8) to be applied as the Leonettis argue, they clearly could have included the terms "residential" or "commercial" to clarify that intent. *Cf. Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106, 546 P.2d 1135, 1137 (1976) ("[W]hat the Legislature means, it will say."). Instead, the code simply provides that when a use is allowed in one zone, it must be deemed prohibited "in *all* other zones of more restrictive classification." P.C.C. § 18.01.030(B)(8) (emphasis added).

¶18 The Leonettis further contend that this conclusion leads to a "chaotic" and "arbitrary" result because "all . . . residential garages may and do often contain multiple operable automobiles not intended for salvage," and therefore, the property owners must "obtain a conditional use permit." As the County points out, however, "keeping a few vehicles on the Property for customary uses" could be "an appropriate accessory use on a residential property," allowable without a permit. *See* P.C.C. § 18.03.020(A)(3) (defining "[a]ccessory use" as "[a] use customarily incidental and subordinate to the principal use of a lot or building located upon the same lot or building site"). Although the Leonettis assert that their "hobby [of collecting automobiles] is simply an accessory use," they cite no

authority for the proposition that storage of more than thirty vehicles on a residential property is a customary or accessory use. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. And the record does not contain any evidence to support such a conclusion. *See id.*

¶19 As noted above, the parties also dispute the interpretation of P.C.C. § 18.07.030(C), entitled "Junk Storage in Residential and Commercial Zones." That section provides: "There shall be no open storage of used materials, appliances, furniture, machinery, etc., in any required yard in rural, residential, RVC, or CB-1 zones." Without citing any legal authority, *see* Rule 13(a)(6), Ariz. R. Civ. App. P., the Leonettis maintain their "licensed, insured automobiles are not classified as machinery or junk," and therefore, P.C.C. § 18.070.030(C) does not apply. But, having found that P.C.C. § 18.01.030(B)(8) bars the Leonettis' use of their property to store a large number of vehicles without a permit, we need not address this argument.

¶20 Additionally, the Leonettis contend that the inspector's interpretation of the zoning code, upheld by the BOA, is unconstitutional and "violat[es] [their] right to equal protection under the law." They maintain that because public schools, churches, parks, and clinics are allowed in the RH zone and "require large areas of parked automobiles on a continuous basis," a "single dwelling is . . . entitled to the same privileges implicitly endowed to [those other] uses." "We review the constitutionality of a zoning ordinance de novo." *Wonders v. Pima County*, 207 Ariz. 576, ¶ 16, 89 P.3d 810, 814 (App. 2004).

¶21 "To establish an equal protection violation, a party must establish (1) that it was treated differently than those who are similarly situated, and (2) when disparate

treatment does not implicate fundamental rights or suspect classification, that the classification bears no rational relation to a legitimate state interest." *Curtis v. Richardson*, 212 Ariz. 308, ¶ 18, 131 P.3d 480, 485 (App. 2006). The Leonettis do not argue that a suspect classification is at issue here. Rather, they assert they "possess the fundamental right that all governing codes be interpreted properly." Such a right, even if it arguably exists, does not constitute a "fundamental right" for equal protection purposes. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34, 93 S. Ct. 1278, 1297 (1973) (fundamental right is one that is "explicitly or implicitly guaranteed by the Constitution"). And, although the Leonettis assert in their reply brief that they "enjoy the fundamental right to choose what they wish to collect on their real property," they cite no authority for that proposition either, *see* Rule 13(a)(6), Ariz. R. Civ. App. P., and our review has found no support for an unfettered fundamental right to "collect" items on one's property.

¶22 Thus, because no fundamental right or suspect classification is at issue here, the zoning regulation, as interpreted by the inspector and upheld by the BOA, is constitutional as long as "it has any conceivable rational basis to further a legitimate governmental interest." *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 555, 637 P.2d 1053, 1058 (1981). As the County points out, quoting *City of Phoenix v. Oglesby*, 112 Ariz. 64, 65, 537 P.2d 934, 935 (1975), "[z]oning laws serve the public welfare by providing for the orderly development of the community." And the zoning code was adopted "[f]or the promotion and protection of the public health, peace, safety, comfort, convenience and general welfare, and in order to secure for the citizens of Pima County,

Arizona, the social and economic advantages of an orderly, efficient use of land." P.C.C. § 18.01.020(B).

¶23 As the Leonettis point out, the inspector averred that the Leonettis' "use of automobile storage" fell within a "conditional uses category" prescribed in another code section that included other uses that were not, "in [her] opinion," "unlawful [or] injurious to the general health or welfare" of the population. That averment, however, does not establish or even suggest that no rational basis exists for the zoning ordinance or the inspector's interpretation of it. Indeed, allowing all property owners in RH zones to store large numbers of automobiles on their properties without restriction could soon undermine the orderly development of the community—particularly, as the County points out, the goals of "preserv[ing] the character . . . of rural areas" and "provid[ing] for commercial and industrial development only where appropriate and necessary to serve the needs of the rural area." P.C.C. § 18.13.010.

¶24 The Leonettis also argue the trial court "den[ied them] their due process rights" by denying their motion for reconsideration and striking their "first affidavit" based "on technicalities." "Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Curtis*, 212 Ariz. 308, ¶ 16, 131 P.3d at 484. The Leonettis have not shown that they were denied either notice or the opportunity to be heard. Rather, as noted above, the trial court struck their "affidavit" because it failed to comply with the Rules of Civil Procedure and denied their motion as "inadequate."

¶25 As the Leonettis argue, "the purpose of the Rules of Civil Procedure is to obviate delay and administer speedy justice, and to effectuate this object[,] will be construed in a reasonable manner." *Union Interchange, Inc. v. Benton*, 100 Ariz. 33, 36, 410 P.2d 477, 479 (1966). But trial courts have wide discretion in ruling on motions for reconsideration. *See Union Rock & Materials Corp. v. Scottsdale Conference Center*, 139 Ariz. 268, 273, 678 P.2d 453, 458 (App. 1983). Here, we cannot say the trial court abused its discretion in denying the motion for reconsideration or in refusing to consider an unsworn document, filed after the entry of judgment, as an affidavit.[5] *See Black's Law Dictionary* 62 (8th ed. 2004) (defining "affidavit" as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public").

¶26 Furthermore, this is not a case in which "'a trial court exercised a discretion vested in it in such a manner that an injustice is done or substantial rights are lost through mere technicalities.'" *Bowman v. Hall*, 83 Ariz. 56, 60, 316 P.2d 484, 486 (1957), *quoting Rawls v. Bhd. of R.R. Trainmen Ins. Dep't*, 35 So. 2d 809, 810 (La. 1948). As noted above, the trial court considered and squarely addressed the substance of the Leonettis'

[5]In their reply brief, the Leonettis argue that the trial court could have considered their affidavit under Rule 56(f), Ariz. R. Civ. P. But this was not a situation like that contemplated by Rule 56(f), in which an affiant or the information sought was unavailable. Rather, the Leonettis simply failed to comply with the rules in submitting their affidavit. And, in any event, the Leonettis failed to file an affidavit providing a basis on which the trial court could have applied this rule. *See Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 493-94, 803 P.2d 900, 904-05 (App. 1990) (court properly rules on motion for summary judgment where party opposing summary judgment has not filed affidavit identifying discovery needed or reasons why evidence cannot be presented).

arguments in its rulings. Nor can we say the court's ruling "was highly technical in its nature and was not conducive to a fair disposition of the rights asserted by plaintiff." *Id.* at 61, 316 P.2d at 487.

DISPOSITION

¶27 The judgment of the trial court is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge